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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM ESPINOZA MOORE, JR.,

Defendant and Appellant.

D069265

(Super. Ct. No. SCD259598)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Reversed in part, affirmed in part, and remanded.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Theodore M. Crompty and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Adam Espinoza Moore, Jr., guilty of assault with the intent to commit rape (Pen. Code, § 220, subd. (a)) (count 1),¹ kidnapping to commit rape (§ 209, subd. (b)(1)) (count 2), sexual battery by restraint (§ 243.4, subd. (a)) (count 3), and four counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) (counts 5-8). The trial court sentenced Moore to prison for a determinate term of four years and a consecutive indeterminate term of life with the possibility of parole.

Moore contends (1) insufficient evidence supports the conviction for kidnapping to commit rape in count 2; (2) insufficient evidence supports the conviction for assault by means of force likely to produce great bodily injury in count 8; and (3) the sentences on count 3 and counts 5 through 8 should have been stayed pursuant to section 654. We conclude that substantial evidence supports the kidnapping to commit rape conviction in count 2, but does not support the assault by means of force likely to produce great bodily injury conviction in count 8. We further conclude that the sentences on count 3 and counts 5 through 7 should be stayed pursuant to section 654. Accordingly, we reverse the conviction on count 8, and we remand for the trial court to enter an amended judgment staying the sentences on counts 3 and counts 5 through 7.

¹ Unless otherwise indicated all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Jane Doe had just exited "Westfield UTC," a shopping mall in La Jolla, to begin her walk home at 8:13 p.m. on August 30, 2015. It was dark outside, and she was walking on a sidewalk paralleling the busy street of La Jolla Village Drive and which was elevated from the road.

Jane Doe heard Moore's footsteps approaching behind her and then felt him grab her with an arm around her waist and a hand over her mouth. Jane Doe tried to scream and bit Moore's hand, but she could not break free because of his strong grip on her waist. Moore then moved his hand from Jane Doe's mouth and placed it on her throat, choking her every time she tried to scream. Jane Doe flailed her arms, but she could not escape Moore's grasp. Moore dragged Jane Doe 106 feet from the sidewalk across a grassy area and into the bushes, which were in between trees and close to a wrought iron fence. As Moore dragged Jane Doe, he tightened his grip on her throat whenever she tried to scream. Jane Doe believed that at one point she lost consciousness for approximately 10 seconds because her airflow was restricted.

Once in the bushes, Moore forced Jane Doe to the ground behind a tree. Jane Doe described the area in the bushes as "really dark" and not visible to someone at street level or someone walking on the sidewalk. Jane Doe pleaded with Moore, "Please don't kill me. Take my wallet." Moore straddled Jane Doe, place both hands on her neck and stated, "I don't want your money. I'm going to fuck you instead." Moore then said, "You're going to want this dick." Jane Doe tried to scream again, but Moore choked her.

Moore used his left hand to hold Jane Doe's wrist above her head while using his right hand to grab Jane Doe's left breast, over her clothing, as he made a moaning sound. Moore then pulled up Jane Doe's shirt, moved aside her bra, and licked her right breast while grabbing it. Moore told Jane Doe to take off her shirt and pulled her to a seated position.

At that point, a man's voice came from behind the trees, saying, "What's going on here?" The man was Justin Lopchuk, who was walking across a pedestrian bridge over La Jolla Village Drive, away from the shopping mall, when he heard screaming in the distance. Although it was dark and the bushes blocked his view, he followed the sound to the area where Moore and Jane Doe were located. When Lopchuk got approximately 20 feet away, he could see Moore hunched over but couldn't see Jane Doe. Lopchuk yelled "Hey" a few times before he got Moore's attention. Jane Doe said, "Please help me" to Lopchuk, while Moore turned to Lopchuk and told him to mind his own business, claiming that Jane Doe was his girlfriend and he could do what he wanted with her. Jane Doe said she was not Moore's girlfriend and again asked Lopchuk to help her. Moore then ran off through the bushes.

Police arrived in response to a 911 call placed by Lopchuk's fiancée, and Jane Doe was taken to a hospital, with redness on her throat and body.

Several weeks later, Moore was identified as a suspect due to DNA evidence, and Jane Doe identified him a photographic lineup.

Moore was arrested and charged with assault with the intent to commit rape (§ 220, subd. (a)) (count 1), kidnapping to commit rape (§ 209, subd. (b)(1)) (count 2),

sexual battery by restraint (§ 243.4, subd. (a)) (count 3), false imprisonment by violence, menace, fraud or deceit (§§ 236, 237, subd. (a)) (count 4), and four counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) (counts 5 - 8). During trial, the prosecutor dismissed the false imprisonment count.

The jury found Moore guilty on all counts, and the trial court sentenced Moore to a determinate prison term of four years and an indeterminate prison term of life with the possibility of parole.

II.

DISCUSSION

A. *Substantial Evidence Supports the Conviction for Kidnapping to Commit Rape*

Moore's first contention is that insufficient evidence supports his conviction for kidnapping to commit rape.

Moore was convicted of kidnapping to commit rape under section 209, subdivision (b), which provides:

"(b)(1) Any person who kidnaps or carries away any individual to commit . . . rape . . . shall be punished by imprisonment in the state prison for life with the possibility of parole.

"(2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense."

Section 209, subdivision (b)(2) sets forth two separate elements that must be proven by the People: (1) defendant's "movement of the victim was not merely incidental" and (2) the movement of the victim "increased the risk of harm to the victim

over and above that which is inherent in the sexual offense itself." (*People v. Robertson* (2012) 208 Cal.App.4th 965, 982.) "[W]hether the victim's forced movement was merely incidental to the rape is necessarily connected to whether it . . . increased the risk to the victim. 'These two aspects are not mutually exclusive, but interrelated.' " (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*).) Moore contends that neither element was supported by sufficient evidence at trial, in that no reasonable juror could find (1) that he moved Jane Doe more than was incidental to the commission of the rape, or (2) that his movement of Jane Doe increased the risk of harm to her.

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citations omitted.)

1. *Substantial Evidence Supports a Finding That Moore Moved Jane Doe More Than Was Incidental to the Commission of Rape*

The first issue is whether substantial evidence supports the jury's finding on the first element in section 209, subdivision (b)(2), namely, that "the movement of the victim

[was] beyond that merely incidental to the commission of . . . the intended underlying offense." (§ 209, subd. (b)(2).)

"Whether a forced movement of a rape victim (or intended rape victim) was merely incidental to the rape . . . is difficult to capture in a simple verbal formulation that would apply to all cases. . . . [T]he jury must 'consider[] the "*scope and nature*" of the movement,' as well as '*the context of the environment in which the movement occurred.*' [Citations.] This standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment." (*Dominguez, supra*, 39 Cal.4th at pp. 1151-1152.) Although a consideration of "the 'scope and nature' of the movement, . . . includes the actual distance a victim is moved," there is "no minimum distance a defendant must move a victim" to satisfy the statutory requirement. (*People v. Vines* (2011) 51 Cal.4th 830, 870, 871 (*Vines*).) "Measured distance, therefore, is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient." (*Dominguez*, at p. 1152.)

This case presents very similar facts to those that our Supreme Court in *Dominguez, supra*, 39 Cal.4th 1141, determined to be sufficient for a finding that the defendant moved a rape victim more than was incidental to the commission of the rape. In *Dominguez*, "[d]efendant forced the victim in the middle of the night from the side of the road to a spot in an orchard 25 feet away and 10 to 12 feet below the level of the road. Though the distance is not great, an aerial photograph of the scene confirms the victim

was moved to a location where it was unlikely any passing driver would see her. Not only was the place to which she was moved substantially below the road — one witness testified it was a down a 'fairly steep' hill — it was within an orchard where the trees would also have tended to obscure defendant's crime from any onlookers. The movement thus changed the victim's environment from a relatively open area alongside the road to a place significantly more secluded, substantially decreasing the possibility of detection, escape or rescue." (*Id.* at p. 1153.)

The facts presented here also bear similarity to those of *People v. Diaz* (2000) 78 Cal.App.4th 243 (*Diaz*), in which the rape victim was pushed to the ground on a grassy area next to a sidewalk. (*Id.* at p. 248.) The defendant then got on top of the victim, presumably to sexually assault her, but a passerby said something, causing the defendant to move the victim approximately 150 feet around to the back of a building. (*Ibid.*) *Diaz* concluded that even though the place to which the defendant moved the victim "may have been a short distance from where the defendant first made contact with the victim" (*id.* at p. 249), the facts "more than adequately support the jury finding that the movement of the victim was . . . not incidental to the sexual assault" (*id.* at p. 248). As *Diaz* explained, "[t]he defendant could have sexually assaulted the victim in the sidewalk area where he first accosted her; indeed, he was in the process of doing so until distracted by the passing citizen. He quite obviously moved the victim in order to complete the attack and avoid detection. The scope and nature of the movement dramatically changed the environmental context." (*Ibid.*)

Here, as in *Diaz* and *Dominguez*, substantial evidence supports a finding that Moore's movement of Jane Doe was more than incidental to the commission of the attempted rape. Moore could have attempted to rape Jane Doe on the grass near the sidewalk after he grabbed her, but he transported her 106 feet to a dark area that was obscured from public view behind bushes and trees. A reasonable juror could find based on these facts that Moore's movement of Jane Doe was not merely incidental to the attempted rape because the "scope and nature of the movement dramatically changed the environmental context" (*Diaz, supra*, 78 Cal.App.4th at p. 248) from "a relatively open area alongside the road to a place significantly more secluded, substantially decreasing the possibility of detection, escape or rescue" (*Dominguez, supra*, 39 Cal.4th at p. 1153).

Moore attempts to distinguish *Dominguez* by arguing that, unlike the victim in *Dominguez*, Jane Doe "was not moved to a place that was *significantly* more secluded," and that instead, this case is more like *People v. Stanworth* (1974) 11 Cal.3d 588, 597-598, in which the defendant's movement of a rape victim a distance of 25 feet from a road into an open field, still in public view, was merely incidental to the rape. The argument is not persuasive. The evidence at trial sufficiently supports a finding that the area behind the bushes and trees where Moore took Jane Doe was much more secluded than the location where he first grabbed her and was not open to public view. Specifically, Moore grabbed Jane Doe on a public sidewalk surrounded by a grassy area and which was next to, but elevated from, a busy street. By dragging Jane Doe 106 feet across the grassy area and *into* the bushes, Moore took her to a dark and secluded area, which was not visible to the public and was not on a public walkway. Lopchuk eventually rescued Jane Doe not

because he *saw* the attempted rape, but because he heard Jane Doe's screams from a significant distance away. Even after following the sound of the screams, he did not see Moore until he came within 20 feet of him. A reasonable juror could easily conclude from this evidence that Moore took Jane Doe to a place that was significantly more secluded and that the secluded location meaningfully decreased the possibility that the rape would be detected.²

In sum, substantial evidence supports a finding that Moore's movement of Jane Doe was "beyond that merely incidental to the commission of . . . the intended underlying offense." (§ 209, subd. (b)(2).)

² Moore argues at length that we should follow the majority's opinion in *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), which expressed the view that when examining whether a defendant's movement of a victim was merely incidental to the commission of a crime, case law often incorrectly "confuse[s] 'incidental' with 'necessary.'" (*Id.* at p. 605.) In *Hoard*'s view, "incidental and necessary do not mean the same thing." (*Id.* at p. 606.) Applying this approach, *Hoard* concluded that based on the facts before it, the defendant's movement of jewelry store employees a distance of 50 feet into a back office during a robbery was merely incidental to the commission of the robbery, as it "served only to facilitate the crime with no other apparent purpose." (*Id.* at p. 607.) Case law has criticized *Hoard*'s discussion of the distinction between "incidental" and "necessary." (See, e.g., *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1050-1052 (*Aguilar*).) However, for the purpose of this appeal, we need not and do not evaluate whether *Hoard* is persuasive. Instead, as we have explained, we rely primarily on *Dominguez, supra*, 39 Cal. 4th 1141, which was decided by our Supreme Court in 2006 *after* the 2002 Court of Appeal decision in *Hoard*, and which is far more apposite here, as it concerns a defendant's movement of a victim to a more secluded outside area to commit a rape, rather than the movement of a victim within a store to commit a robbery.

2. *Substantial Evidence Supports a Finding That Moore's Movement of Jane Doe Increased the Risk of Harm Over and Above That Present in the Intended Rape*

We next consider whether substantial evidence supports the jury's finding on the second element in section 209, subdivision (b)(2), namely that "the movement of the victim . . . increase[d] the risk of harm to the victim over and above that necessarily present in . . . the intended underlying offense." (*Ibid.*)

The element requiring increased risk of harm to the victim " "includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased." ' ' " (*Vines, supra*, 51 Cal.4th at p. 871.) " 'In the vast majority of cases, the increased risk of harm to the victim is a risk of physical harm. However, this requirement can also be satisfied by a risk of mental, emotional, or psychological harm.' " (*People v. Leavel* (2012) 203 Cal.App.4th 823, 834.)

As specifically relevant in this case, " '[w]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short.' " (*Aguilar, supra*, 120 Cal.App.4th at p. 1048.) "Courts have held that moving a victim to a more isolated open area which is less visible to public view is sufficient" to satisfy the second element of section 209, subdivision (b)(2). (*Aguilar*, at p. 1049.)

Here, as we have discussed, the evidence is sufficient to support a finding that Moore moved Jane Doe to an area that was much less in the public view than the

sidewalk where he first grabbed her. The area in the bushes was dark and isolated, greatly increasing Moore's opportunity to commit acts on Jane Doe that would cause both physical and psychological harm. By taking Jane Doe to a secluded area, there was a much greater risk that Moore would be able to proceed farther with his sexual assault than if he kept Jane Doe in the more public area where he first attacked her and where he was more likely to be discovered. Further, if Moore had continued with the rape as he planned, he could have physically injured Jane Doe or rendered her unconscious, and because she was in a secluded area, shielded from public view, she would have been unable to get medical assistance.

The courts in both *Diaz* and *Dominguez* — under similar factual scenarios — concluded that the defendant's act of moving the rape victim to a more secluded location increased the risk of harm beyond that inherent in the rape itself. As *Diaz* explained, "[c]learly, the risk to the victim in the dark and isolated location of the attack increased significantly as compared to the lighted sidewalk near the bus stop where the incident began." (*Diaz, supra*, 78 Cal.App.4th at p. 249.) *Dominguez* concluded that the defendant's forced movement of the victim "removed her from public view and substantially increased her risk of harm" (*Dominguez, supra*, 39 Cal.4th at p. 1154) by "substantially decreasing the possibility of detection, escape or rescue." (*Id.* at p. 1153.) Indeed, even *Hoard, supra*, 103 Cal.App.4th 599, on which Moore heavily relies, stated that "a rape victim is certainly more at risk when concealed from public view and therefore more vulnerable to attack." (*Id.* at p. 607.)

In sum, we conclude that the conviction for kidnapping to commit rape in count 2 is supported by substantial evidence.

B. *The Conviction for Assault by Means of Force Likely to Produce Great Bodily Injury in Count 8 Is Not Supported by Substantial Evidence*

We next consider Moore's argument that insufficient evidence supports the jury's finding that he committed the assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) as charged in count 8.

As we have explained, Moore was charged with four separate counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)).³ In the information, the People described the conduct corresponding to each of the four assault counts, specifying that they were based on four different incidents of choking during the attack. Count 5 specified, "to wit: choked victim on the sidewalk." Count 6 specified, "to wit: choked victim while moving her from sidewalk up the grassy hill." Count 7 specified, "to wit: choked victim while straddling her." Count 8 specified, "to wit: choked victim after she screams as defendant licks victim's breast."

The verdict form that the jury was asked to fill out for each of the four assault counts contained the specific language from the information describing the conduct associated with each count. Accordingly, the verdict form for count 8, as completed by the jury, stated as follows: "We, the jury in the above-entitled cause, find [Moore] guilty

³ The information originally included a fifth count of assault by means of force likely to produce great bodily injury, which was dismissed prior to trial, following a motion to dismiss by Moore pursuant to section 995.

of the crime of Assault By Means Of Force Likely To Produce Great Bodily Injury (Victim: Jane Doe), to wit: choked victim after she screams as defendant licks victim's breast, in violation of section 245(a)(4) . . . , as charged in Count Eight of the Information."

Moore contends that insufficient evidence supports the verdict finding him guilty on count 8 because Jane Doe specifically testified at trial that Moore did not choke her around the time that he licked her breast or any time thereafter, and accordingly, the evidence does not support a finding that he "choked victim after she screams as defendant licks victim's breast" as specified in the information and the verdict form.

To assess this argument we turn to the evidence at trial concerning whether Moore choked Jane Doe around the time that he licked her breast. As we will explain, the evidence shows that Moore *did not* choke Jane Doe around the time that he licked her breast or afterwards, but he *did* choke her a total of at least four times during the entire attack.

As Jane Doe testified, Moore first choked her while she was struggling with him near the sidewalk after she bit his finger. Jane Doe also testified that Moore continued to choke her whenever she screamed as Moore dragged her to the area behind the bushes. Then, after Moore pushed her to the ground, he straddled her and choked her after she screamed in response to his statement that he was going to sexually assault her. Moore then used one hand to hold Jane Doe's hands over her head and one hand to touch her breasts while he licked her.

The following exchange took place between Jane Doe and the prosecutor regarding whether Moore choked Jane Doe around the time that he licked her breast:

"Q. What kind of reaction does that have on you when he's licking your breast?

"A. I start crying. I'm scared.

"Q. You tried to scream for help?

"A. Yes.

"Q. What, if anything, does the male do to you after you scream?

"A. He goes, Sh. Just shut up.

"Q. Does he choke you again?

"A. No."

Jane Doe then testified that Moore told her to take off her shirt and pulled her to a seated position. According to Jane Doe, Lopchuk then intervened, and she screamed and asked Lopchuk to help her. The prosecutor asked, "Does [Moore] choke you for a fourth time?" Jane Doe answered, "Not then, no. He just goes 'Shut up' and then turns to the guy that was behind us and goes, Mind your own business. Nothing's happening here." Jane Doe then continued to describe the intervention by Lopchuk and Moore's flight from the scene, without describing any further choking by Moore.

The prosecutor returned to the subject of when Moore choked Jane Doe during the incident.

"Q. Now you indicated that — I asked you whether or not the male had choked you a fourth time. You said not at that time — after you had screamed when he had licked your nipple. When was the fourth time that he had choked you?

"A. The majority of the choking was just periodic throughout the attack. So it was like the initial choke after I bit his finger, the choking as I was being dragged up the knoll, and then like chokes while I was on the ground trying to scream. So like one and then two again.

"Q. Okay. So when you were on the ground is when he choked you a third time after you offered the wallet?

"A. Uh-huh.

"Q. Was there anything that we can associate the fourth choke with?

"A. More screaming and me trying to get out."

Based on this testimony, substantial evidence supports a finding that Moore choked Jane Doe four times *during the entire attack*, as he choked her once by the sidewalk, at least once as he was dragging her, and more than once while she was on the ground struggling to get free. However, substantial evidence *does not* support a finding that Moore choked Jane Doe under the circumstances described in count 8, namely "choked victim after she screams as defendant licks victim's breast."

In light of this evidence, Moore argues that "even if this court finds sufficient evidence of an alleged fourth act [of choking], the conviction of count eight must still be reversed because this court is limited to the particular facts alleged in the Information and on the verdict form to support count eight" in determining whether substantial evidence supports the verdict on that count. Put another way, Moore argues that because the People elected to proceed on a particular factual theory as to count 8 and informed the jury of that election in the verdict form, in reviewing whether substantial evidence

supports the guilty verdict on count 8, we may look only to the evidence supporting *the particular factual theory* that the People elected for count 8.

The fundamental premise of Moore's argument is that the People made an *election* as to the particular factual theory upon which they were proceeding as to each of the four assault counts to avoid any infringement on Moore's constitutional right to a unanimous verdict. Under the California Constitution, a defendant has the right to a *unanimous* jury verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 321.) Accordingly, a defendant may not be found guilty of a particular crime unless each juror agrees that the defendant committed the *same* specific act constituting the crime. (*People v. Crow* (1994) 28 Cal.App.4th 440, 445.) Jurors may not "amalgamat[e] evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count." (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.) When a single crime is charged but "the evidence suggests more than one discrete crime, *either* the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, italics added.) As we will explain, the People clearly made an election as to the particular factual theory supporting count 8 to insure the unanimity of the verdict.

At the time the People filed the information, Jane Doe already had testified at the preliminary hearing that Moore grabbed her neck to choke her "[e]very time I would try to scream," which was "[w]henenever I could throughout the attack," and she described several specific instances of choking. Based on this testimony, the information charged

Moore with multiple counts of assault by means of force likely to produce great bodily injury, but the People specified the particular factual theory underlying each count to avoid any confusion as to the conduct supporting each count. The prosecutor *twice* explained to the trial court that a concern with jury unanimity was the reason the People set forth the particular factual theory for each assault count. Specifically, in opposing Moore's pretrial motion to dismiss, the prosecutor explained that the People had included the "to wit" language in each of the assault counts to "simplif[y] the task on the jury without having to give a unanimity instruction." Later, during discussion of jury instructions and verdict forms, the prosecutor explained to the trial court that the reason she included the "to wit" language in each of the assault counts was to "try[] to avoid the unanimity instruction." Thus, the record clearly shows that by including "to wit: choked victim after she screams as defendant licks victim's breast" for count 8 in both the information and the verdict form, the People expressly *elected* to proceed on that particular factual theory to insure a unanimous verdict as constitutionally guaranteed to the defendant. (See *People v. Mayer* (2003) 108 Cal.App.4th 403, 418-419 [prosecutor made an election for jury unanimity purposes when the verdict form directed the jury to particular factual allegations as charged in the indictment, limited to a specific date]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539 [an election by the prosecutor "must be made with as much clarity and directness as would a judge in giving instruction" and the "record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act"].)

Logically, when the People make an explicit election of a particular factual theory to support a criminal charge, and that election is communicated to the jury in a verdict form setting forth the particular factual theory, the jury must be presumed to have relied on the prosecution's election and limited its finding of guilt to the particular factual theory elected by the People. In this case specifically, if the jury were not limited to the particular factual theory elected by the People in count 8, the election would have been ineffectual to insure the unanimity of the verdict, as each different juror would have been free to rely on any of the several instances of choking during the attack to reach a finding of guilt on count 8. Thus, our review of the verdict to determine if it is supported by substantial evidence is limited to an inquiry into whether the evidence at trial supports *the particular factual theory* elected by the People for count 8, namely that Moore "choked victim after she screams as defendant licks victim's breast."

The People argue unpersuasively that even if the particular factual theory for count 8 described in the information and the verdict form constitutes an election by the prosecutor for unanimity purposes, "the reviewing court is not bound to the theory of liability suggested by the prosecutor." In support of this argument, the People cite case law explaining that nonessential averments in an accusatory pleading may be disregarded as "surplusage" for the purpose of deciding whether substantial evidence supports the charged crime. (*People v. Randazzo* (1957) 48 Cal.2d 484, 490 [although the information charged the defendant with kidnapping using the elements in an old version of the statute, the conviction was proper because the evidence supported a verdict under the current statutory language, with the outdated language being "disregarded as surplusage"]);

People v. Matula (1959) 52 Cal.2d 591, 598 [indictment charging defendant with perjury contained specific averments of materiality, which were not proven at trial, but those averments could be disregarded as surplusage in determining whether substantial evidence supported the verdict, as the indictment also included general averments of materiality].) Those cases are not applicable here because they have nothing to do with a prosecutor's *explicit election* of a particular factual theory to ensure a unanimous verdict. In neither *Matula* nor *Randazzo* was the surplus language in the accusatory pleading communicated to the jury, and thus the jury did not limit its finding of guilt or innocence to the theory described in the accusatory pleading. Here in contrast, the jury was specifically informed, through the verdict form, that count 8 was limited to a particular factual theory.

Second, the People cite case law stating that "the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126; see also *People v. Leonard* (2014) 228 Cal.App.4th 465, 487 ["the jury was not limited to the prosecution's stated theory" in closing argument].) Here, however, we are not concerned with *argument* by the prosecutor as to how the jury should approach a particular issue. Instead, we are concerned with an explicit election in the information and in the verdict form, which necessarily limited the scope of the jury's finding on count 8.

In sum, because the People explicitly elected to proceed on a particular factual theory on count 8, our substantial evidence review is limited to whether the evidence at trial supported a finding on the particular factual theory elected. As we have explained,

the evidence at trial does not support a finding that Moore "choked victim after she screams as defendant licks victim's breast" as specified in count 8. We therefore reverse the conviction on count 8 because it is not supported by substantial evidence.

C. *The Sentences on Count 3 and Counts 5 Through 7 Should Have Been Stayed Under Section 654*

We next consider Moore's contention that the sentences for certain counts should have been stayed pursuant to section 654.

During sentencing, the trial court imposed a sentence of six years on the assault to commit rape conviction (§ 220, subd. (a)) in count 1, but stayed the sentence pursuant to section 654. On the sexual battery conviction (§ 243.4, subd. (a)) in count 3, the court imposed a four-year prison term, which it ordered to be served consecutively to the life term for the aggravated rape count. For the four counts of assault by means of force likely to produce great bodily injury convictions (§ 245, subd. (a)(4)) in counts 5 through 8, the trial court imposed a four-year prison term on each count, which it ordered to be served concurrently to the prison term for the sexual battery count, but consecutively to the life term for the kidnapping to commit rape conviction.

Moore contends that the sentence on the sexual battery count (count 3) and the assault counts (counts 5 through 8)⁴ should have been stayed under section 654 because those convictions arose from the same course of conduct as the assault with intent to

⁴ Because we have reversed the sentence on count 8, we need not consider whether the sentence on that count should be stayed. However, our analysis for counts 5 through 7 would have applied equally to count 8.

commit rape conviction in count 1 and the kidnapping to commit rape conviction in count 2.

1. *Applicable Legal Standards*

Under section 654, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." (§ 654, subd. (a).) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] . . . [Citation.] If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551, italics added (*Perez*).) "If . . . [a] defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The application of section 654, thus, "turns on the *defendant's* objective in violating" multiple statutory provisions. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) Where the commission of one offense is merely " 'a means toward the objective of the commission of the other,' " section 654 prohibits separate punishments for the two offenses. (*Britt*, at p. 953.) Where "section 654 prohibits multiple

punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

We apply a substantial evidence standard of review when determining whether section 654 applies. "The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438; see also *People v. Osband* (1996) 13 Cal.4th 622, 730 [approving substantial evidence standard of review as stated in *Saffle*].)

2. *Sentence for Sexual Battery in Count 3*

The People concede that Moore's "sentence for sexual battery by restraint in count three . . . should have been stayed." As the People explain, that result is required by *People v. Latimer* (1993) 5 Cal.4th 1203, 1216-1217 (*Latimer*). We agree.

In *Latimer* the defendant drove the victim to an isolated area so that he could rape her, leading to a conviction of kidnapping and two counts of rape. (*Latimer, supra*, 5 Cal.4th at p. 1206.) In considering whether section 654 applied, our Supreme Court held that "[a]lthough the kidnapping and the rapes were separate acts, the evidence does not suggest any intent or objective behind the kidnapping other than to facilitate the rapes. 'Since the kidnapping was for the purpose of committing the sexual offenses and [defendant] has been punished for each of the sexual offenses,' section 654 bars execution of sentence on the kidnapping count." (*Latimer*, at p. 1216.)

Latimer's reasoning applies to the sexual battery count and the aggravated kidnapping count here. Because the aggravated kidnapping in count 2 was for the

purpose of facilitating the sexual battery in count 3, section 654 bars separate punishment for both offenses, and the count with the shorter term of punishment (count 3) should have been stayed.

3. *Sentence for Assaults in Counts 5 through 7*

Each of the assaults in counts 5 through 7 were based on Moore's acts of choking Jane Doe during the incident. Moore argues that the sentence for each of the assault counts should have been stayed under section 654 because "it is . . . clear from the victim's testimony that [Moore] choked the victim to silence her screams so he could accomplish the intended objective of raping her." Put simply, Moore contends that each instance of choking was committed with the same objective as the aggravated kidnapping and the assault to commit rape, namely to carry out a rape of Jane Doe.

The People disagree, arguing that "by choking [Jane] Doe[, Moore] did not seek to accomplish her rape. . . . [H]e choked her only when she screamed, his apparent purpose to evade detection." The argument is not persuasive. A defendant who commits an assault to avoid being interrupted *during* the commission of an underlying crime, is acting with the goal of *accomplishing* the underlying crime. (See, e.g., *People v. Flowers* (1982) 132 Cal.App.3d 584, 590 [assault during a robbery to quiet the victim and to counter the victim's resistance was for the purpose of facilitating the robbery, and therefore § 654 applied to bar separate punishment for assault and robbery].)

The evidence at trial showed that Moore choked Jane Doe during the attack to silence her screams so that he could proceed without being interrupted. As Jane Doe testified, "It felt like every time I would try to scream and I would try to continue to

scream, that [he] would just keep choking me and putting force on my neck." As she explained, "So when I would like start gasping for air and stuff, he would let go a little bit. And then I would try to scream again, and then he would get tighter around my neck again."

Because Moore choked Jane Doe to facilitate the commission of the intended rape, the act of choking Jane Doe and the aggravated kidnapping and assault to commit rape of Jane Doe "were *incident to one objective*." (*Perez, supra*, 23 Cal.3d at p. 551, italics added.) We therefore conclude that the trial court erred in not staying the sentence on counts 5 through 7 pursuant to section 654.

DISPOSITION

The conviction on count 8 is reversed as it is not supported by substantial evidence. The sentence on counts 3, 5, 6, and 7 must be stayed pursuant to section 654. This matter is remanded to the trial court to impose a sentence consistent with this opinion and to thereafter forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.